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State v. Stocks Appellant's Brief Dckt. 39041

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. MICHAEL S. STOCKS, Defendant/Appellant.	Supreme Court Docket No. 39041-2011 Franklin County Case No. CR-2011-36

APPELLANT'S BRIEF

Appeal from the District Court of the Sixth Judicial District
of the State of Idaho, in and for the County of Franklin

Honorable Mitchell W. Brown

Aaron N. Thompson (ISB#: 6235)
MAY, RAMMELL & THOMPSON, CHTD.
P.O. Box 370
Pocatello, ID 83204-0370
Telephone: (208) 233-0132
Fax: (208) 234-2961
Attorney for Defendant/Appellant

Lawrence Wasden
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 334-2400
Fax: (208) 854-8071
Attorney for Plaintiff/Respondent

TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1
A. NATURE OF THE CASE 1
B. COURSE OF PROCEEDINGS AND DISPOSITION 1
C. ISSUE PRESENTED 2
1. *Did the State of Idaho breach it's plea agreement with Mr. Stocks by its agrument at the sentencing hearing?* 2
D. STATEMENT OF FACTS 2

II. LEGAL STANDARD 6

III. ARGUMENT 8
A. THE STATE BREACHED ITS PLEA AGREEMENT IN ITS ARGUMENT TO THE COURT 8

IV. CONCLUSION 16

TABLE OF AUTHORITIES

CASE

Maybry v. Johnson, 467 U.S. 504, 508-09, 104 S. Ct. 2543, 2546-47, 81 L.Ed.2nd 437, 442, 483 (1984) 7

Remington v. State, 127 Idaho 443, 448, 901 P.2d 1344, 1349 (Ct. App. 1995) 11

Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L.Ed.2nd 427, 433 (1971) 7

Small v. State, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998) 11

State v. Allen, 143 Idaho 267, 271-72, 141 P.3d 1136, 1140-41 (Ct. App. 2006) 6, 7

State v. Barnett, 133 Idaho 231, 234, 985 P.2d 111, 114 (1999) 9, 10

State v. Brooke, 134 Idaho 807, 809 10 P.3d 756, 758 (Ct. App. 2000) 11, 16

State v. Claxton, 128 Idaho 782, 785, 918 P.2d 1227, 1230 (Ct. App. 1996) 9, 10

State v. Daubs, 140 Idaho 299, 300, 92 P.3d 549, 550 (Ct. App. 2004) 7, 12, 13, 16

State v. Doe, 138 Idaho 409, 64 P.3d 335 (Ct. App. 2003) 9, 10, 16

State v. Fuhriman, 137 Idaho 741, 744, 52 P.3d 886, 889 (Ct. App. 2002) 7, 11, 16

State v. Jafek, 141 Idaho 71, 74, 106 P.3d 397, 400 (2005) 6

State v. Jones, 139 Idaho 299, 301-02, 77 P.3d 988, 990-91 (Ct.App.2003) 7, 8, 10, 11, 12, 16

State v. Lankford, 903 P.2d 1305, 127 Idaho 608 (1995) 8, 9

State v. Rutherford, 107 Idaho 910, 913, 693 P.2d 1112, 1115 (Ct. App. 1985) 7

State v. Wills, 140 Idaho 773, 102 P.3d 380 (Ct. App. 2004) 13, 16

United States v. Benchimol, 471 U.S. 453, 455, 105 S. Ct. 2103, 2104, 85 L.Ed.2nd 462, 465 (1985) 8

United State v. Bunner, 134 F.3d 1000, 1003 (10th Cir. 1998) 10

United States v. Canada, 960 F.2d 263, 270 (1st Cir.1992) 12

United States v. Sutton, 794 F.2d 1415, 1423, (9th Cir. 1986) 9

STATUTES

Idaho Code § 18-1508 ..... 1, 2, 3

Idaho Code § 19-2604(4) 10

I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Defendant Michael Stocks pled guilty to one count of lewd conduct with a minor under the age of sixteen, pursuant to *Idaho Code* § 18-1508 pursuant to a non-binding Rule 11 agreement. The State agreed not to recommend a harsher penalty then what was recommended by the Presentence Investigator. The Presentence Investigator recommended that the District Court retain jurisdiction, and allow Mr. Stocks to attend the "rider" treatment and rehabilitation program. Sentencing was held on or about June 30, 2011. The District Court sentenced Mr. Stocks to ten years unified, two years fixed, eight years indeterminate. A Rule 35 motion is pending with the District Court.

B. COURSE OF PROCEEDINGS AND DISPOSITION

On or about January 10, 2011, Michael S. Stocks was charged, via criminal complaint, with three counts of lewd conduct with a minor under sixteen, in violation of Idaho Code § 18-1508. (*R* at 1-3). On January 14, 2011, Mr. Stocks posted bail, appeared with his attorney at arraignment, and was ordered for release from Caribou County Jail while being subject to ankle monitoring. (*R* at 22). On January 21, 2011, Mr. Stocks waived his preliminary hearing. (*R* at 23). On February 28, 2011, Mr. Stocks appeared before District Court and entered pleas of not guilty to all three counts of lewd conduct. (*R* at 30). On May 26, 2011, Mr. Stocks and the State entered into a non-binding Rule 11 plea agreement which was submitted to the Court, in writing. (*R* at 51-53). The non-binding Rule 11 agreement held that Mr. Stocks would plead guilty to Count I of the criminal information dated January 4, 2011, which was one count of lewd conduct

with minor under the age of sixteen, pursuant to *Idaho Code* § 18-1508. Conditioned upon the accepted plea of guilty, the State agreed to dismiss Counts II and III of the January 24, 2011 indictment. (*Tr.* at 1-2). Further, the State agreed, at sentencing, not to recommend any harsher sentence than recommended in the presentence investigation. (*R.* at 51-53). The presentence investigator recommended that Mr. Stocks participate in the retained jurisdiction "rider" program. (*R* at PSI). Upon hearing arguments of counsel, the District Court entered a preliminary judgment of conviction, and sentenced Mr. Stocks to two years fixed, eight years indeterminate , with custody and control to the Idaho Department of Corrections. (*R* at 71). Final Judgment of Conviction was entered on June 30, 2011, which assessed a unified term of ten years, two years fixed, and subsequent indeterminate term of eight years. (*R* at 71-74).

C. ISSUE PRESENTED:

a. *Did the State of Idaho breach it's plea agreement with Mr. Stocks by its argument at the sentencing hearing?*

D. STATEMENT OF FACTS

On January 5, 2011, A.C. presented to local law enforcement to report sexual abuse against Defendant Michael Stocks (hereinafter "Mike"). (*R* at 8). According to the accusations, Mike had, over a course of a summer, repeated manual-to-genital sexual contact with A.C. (*R* at 8). At the time, Mike was 25 years old, and A.C. was 9. (*R* at 8). Mike is A.C.'s uncle. (*R* at 8).

Law enforcement interviewed Mike, with counsel present, on January 10, 2011. (*See Psychosexual Evaluation*). Although Mike disagreed with several of the factual accusations

A.C. made, Mike did admit that he did commit lewd conduct by virtue of manual-genital contact with A.C. (*See Psychosexual Evaluation*). Mike, immediately after the interview, was arrested, charged, and shortly thereafter, he posted bail. (*R* at 18-22). Pursuant to his bond agreement, Mike was required to wear an ankle monitor. (*R* at 22). At the advice of counsel, Mike underwent a psychosexual evaluation with Dr. Kenneth Lindsey. (*R* at 45). At the conclusion of the psychosexual evaluation, Dr. Lindsey issued written recommendations. (*See Psychosexual Evaluation*). Mike successfully completed a full disclosure polygraph, and ultimately, for therapeutic purposes, recommended aggressive sex offender probation. (*See Psychosexual Evaluation*). The psychosexual evaluation was provided to the prosecuting attorney before any plea agreement was reached. *(R* at 61). After reviewing the psychosexual evaluation, the State and Mike entered into a non-binding Rule 11 plea agreement, which was reduced to writing. (*R* at 51-53). The non-binding Rule 11 plea agreement held that Mike would plead guilty to one count of lewd contact pursuant to *Idaho Code* § 18-1508, counts II and III of the indictment would be dismissed, and the State agreed to argue for no harsher of a sentence then what was recommended by the presentence investigation. (*R* at 51-53).

Mike underwent the presentence investigation process, and on June 27, 2011, the presentence investigation rendered her recommendations. The presentence investigator recommended that Mike participate under retained jurisdiction program. (*See Presentence Report*). Therefore, pursuant to the Rule 11 plea agreement, the State was required to recommend retained jurisdiction, or less, at the sentencing hearing. (*R* at 51).

At the sentencing hearing, at the onset of the State's recommendations to the Court, the prosecutor made reference to the various support letters Mike had received and sent to the PSI. (*Tr.* at 12-14). In essence, the prosecutor went through the letters of support, casted aspersions upon the writers, and the contents thereof. (*Tr.* at 13-14). The State argued:

> These letters—that is a sampling of these letters your honor. I've got several other tabs, I won't belabor the issue, but I guess, suffice it to say that there are many letters in here that talk about a great person of high moral character and integrity Mr. Stocks is that are attached to this PSI. As is the case, in child molestation cases, such as this that is not a typical(sic) your honor. In fact it is typical that a child molester will come to Court and have many people step up to his defense and say it can't be Michael Stocks, not this person, I know him to be a great person, caring kind. Unfortunately, in this case your Honor, as the Court knows and as Mr. Stocks has admitted in the one count of Lewd Conduct that he has pled guilty to for manual genital contact. There is a dark side to Mr. Stocks. A dark underbelly to this man on the exterior with adults, young people and children puts on a façade, of being someone who is of high moral character of great integrity. Who is then yielding too deeper—whether it is a psychological or simply a sexual issue that he has got, Your Honor.

(*Tr* at 13-14).

After this colloquy, the State went through the presentence investigation, and pointed out each and every negative admission Mike made to the Presentence Investigator and to the Psychosexual Evaluator. (*Tr* at 14-15). The State made repeated references to the age disparity between Mike and the victim. (*Tr* at 15).

The State further argued:

> This is the dark side of Mr. Stocks, Your Honor, an individual can—can be student body president, can put on a façade to the people around him to what a good person of high moral standing he is. But if he is doing this on the side, he doesn't have good character, he doesn't have high moral standards, he is not in tuned with what is right and wrong and his associations with minors and he doesn't have integrity.... He feels he's being unjustly treated, Your Honor. He's concerned that he has to be a registered sex offender for the rest of this life. What

> about the rest of this victims life, what about the rest of this little nine year old girls life who is best friends with her uncle, her favorite uncle and was abused and molested by him, by his admission on repeated occasions... He would look at child pornography for up to one to two hours at a time and would masturbate to either the child images or the adult images.... Mr. Stocks ultimately admitted that the child pornography was thing that he liked the most or a maybe sixty forty split and he preferred looking at girls ranging in age from seven to nine with flat chests and no pubic hair. Page six, another big concern that State has in this case Your Honor, with respect to the defendant's argument for probation.... He holds his victim responsible for the behavior because she wanted and like the sex play that happened. A now twenty-six year old man when he was twenty-five, and Dr. Lindsey's estimation holds his victim responsible, this nine year victim because she liked it.

(*Tr.* at 16-18).

The State degrades the fact that Mike has no prior criminal record by pointing out that there was another disclosed victim in the full disclosure polygraph. (*Tr.* at 18). The State also downplayed Mike's performance on the ankle monitor (and the fact that it had been repeatedly malfunctioning) by stating:

> I concede the fact that while under the microscope of this Courts pretrial release and a more enhanced microphone, microscope if you will, Your Honor, on the GPS ankle monitor even though that was malfunctioning, I am sure Mr. Stocks realized that should he choose to violate the terms, eventually we would catch up with him. So, he done well on release, I don't think that's a good indicator of what he would do on probation. (*Tr.* at 18-19).

The State then downplayed Franklin County's ability to monitor Mr. Stocks:

> Your Honor, I don't think [sex offender probation] can be provided – I know it can be provided [in] this community. Maybe we had Mr. Gentry here earlier as the Court knows in district six he handles all of the sex offender caseload and he doesn't come to Preston on a regular basis. So I don't that is a viable option in this case, Your Honor. Even though this is Mr. Stocks first felony, as counsel indicated frankly admitted on Mr. Stocks behalf he started with a doosy. (*Tr.* at 19).

The State then makes reference to Mr. Stocks's likelihood of re-offense,

> Dr. Lindsey does say in his report a couple of different times in the recommendation part, not just that he needs sexual offender treatment because he is at high moderate risk to reoffend but I believe that the exact words he used—I am looking on the last page of this report, recommendation number two, "He needs to have an aggressive sex—he needs to be on an aggressive sex offender case load." (*Tr.* at 19).

The Court, apparently moved by Mr. Garbett's comments, made the statement,

> I've given consideration to many letters of support that have been provided on your behalf. I look out in the audience and I see a brokenhearted family out there and that bothers me. I see a twenty-six year old man who has done a lot of good in his life who has been a class president, a seminary president, served a successful mission. All while during that time as Mr. Garbett [the prosecutor] has indicated that apparently there is something under the surface that is not right and that's not proper and that is a dark side or a Jekyll and Hyde side. (*Tr.* at 22).

The Court also stated:

> I am always struck in this these types of cases that the majority of these cases that I see that I find that there is no previous criminal history and that often times that's relied upon by the presentence investigator and defense counsel as something that is positive. And it in no way is negative it certainly is positive but to me it often times underscores and underlies the personality trait in a lot of these individuals as I harken back over the years of being a judge and being an attorney, that these individuals are often times very charismatic individuals. Very likable individuals, very able to do what they do and convince individuals to not rat them out, to not tell other people and to allow the abuse and the problems to continue to go forward. (*Tr.* at 24).

Thereafter, the Court sentenced Mr. Stocks to ten years unified, two years fixed, with eight years indeterminate. (*Tr.* at 26).

II. LEGAL STANDARD

The Supreme Court has held that breach of a plea agreement constitutes fundamental error. *See State v. Jafek*, 141 Idaho 71, 74, 106 P.3d 397, 400 (2005) (holding that claim of State's breach of agreement goes to the foundation or the basis of defendant's rights and therefore, constitutes fundamental error and may be reviewed for the first time on appeal); *State*

v. Allen, 143 Idaho 267, 271-72, 141 P.3d 1136, 1140-41 (Ct.App.2006) (holding that State's breach of plea agreement constitutes fundamental error and, therefore, defendants failure to object in the district court did not waive the right to raise the issue for the first time on appeal). It may be reviewed for the first time on appeal provided a sufficient record exists for review. *See State v. Daubs*, 140 Idaho 299, 300, 92 P.3d 549, 550 (Ct. App. 2004).

It is well established that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499, 30 L.Ed.2nd 427, 433 (1971). This principle is derived from the Due Process Clause and the fundamental rule, that to be valid, a guilty plea must be both voluntary and intelligent. *Mabry v. Johnson*, 467 U.S. 504, 508-09, 104 S. Ct. 2543, 2546-47, 81 L.Ed.2nd 437, 442, 483 (1984); *State v. Rutherford*, 107 Idaho 910, 913, 693 P.2d 1112, 1115 (Ct.App.1985). If the prosecution has breached its promise giving in a plea agreement, whether that breach was intention or inadvertent, it cannot be said that the defendant's plea was knowing and voluntary, or that the defendant has been lead to plead guilty on a false premise. *State v. Jones*, 139 Idaho 299, 301-02, 77 P.3d 988, 990-91 (Ct.App.2003). In such event, the defendant will be entitled to relief. *State v. Fuhriman*, 137 Idaho 741, 744, 52 P.3d 886, 889 (Ct.App.2002). As remedy, the court may order specific performance of the agreement or may permit the defendant to withdraw the guilty plea. *Santobello*, 404 U.S. at 263, 92 S. Ct. at 499, 30 L.Ed.2nd 433; *Jones*, 139 Idaho 303, 77 P.3d at 991.

The prosecutions obligation to recommend a sentence promised in a plea agreement does not care with it the obligation to make the recommendation enthusiastically. *United States v. Benchimol*, 471 U.S. 453, 455, 105 S. Ct. 2103, 2104, 85 L.Ed.2nd 462, 465 (1985); *Jones*, 139 Idaho at 302, 77 P.3d at 991. A prosecutor may not circumvent a plea agreement, however, through words or actions that convey a reservation about a promised recommendation, nor may a prosecutor impliedly disavow the recommendation as something the prosecutor no longer supports. *Jones*, 139 Idaho 302, 77 P.3d at 991. Although prosecutors need not use any form of particular expression in recommending an agreed sentence, there overall conduct must be reasonably consistent with making such a recommendation, rather than the reversed. *Id.*

III. ARGUMENT

A. THE STATE BREACHED ITS PLEA AGREEMENT IN ITS ARGUMENT TO THE COURT.

There are many cases addressing a breach of plea agreement by the State in its recommendation arguments. One case is *State v. Lankford*, 903 P.2d 1305, 127 Idaho 608 (1995). The Idaho Supreme Court reexamined the breach of a plea agreement by the State. The State was required to recommend an indeterminate life sentence in exchange for the cooperation given by the defendant. *Id* at 613-614. At the sentencing argument, the State cross-examined defense witnesses in an aggressive fashion and presented evidence in aggravation of its own. *Id* at 617. On appeal, the Supreme Court held:

> At the outset of the resentencing proceeding, the district court instructed the prosecution that it had to walk a "fine line" in presenting evidence in aggravation

> while at the same time still bound to the original recommendation for an indeterminate life sentence. A review of the evidence and arguments indicate that the fine line was crossed many times. Allowing the state to make the arguments and introduce the evidence in aggravation to the extent that was done was reversible error, because it was so fundamentally at odds with the position the state was obligated to recommend that it amounted to a violation of the agreement. In this case the state was bound to a plea agreement for the minimum sentence that could be imposed. The evidence and arguments submitted by the state clearly called for a greater sentence.
>
> *Id* at 617.

Correspondingly, the Court remanded sentencing to a district court that had not been exposed to the impermissible presentation of evidence and aggravation.

Many cases have followed this jurisprudence. In 2003, the Court of Appeals in *State v. Doe*, 138 Idaho 409, 64 P.3d 335 (Ct. App. 2003), addressed violation of a plea agreement with a juvenile. In this case, a plea agreement was reached between Doe, a minor, and the State, by which a battery was reduced to disturbing the peace. *Id* at 410. The State agreed to recommend an informal adjustment, place Doe on probation, write a letter of apology to the victim and perform community service, amongst other things. *Id.* There was no written plea agreement, but was recited to the Court on the record. *Id.* The record was silent as to whether the State could request restitution to the victim. *Id.* Some time thereafter, the State asked the Court to order restitution be paid to the victim. The magistrate ordered restitution be paid, over Doe's objection. *Id.* Court cited:

> Because plea agreements are contractual in nature, they are generally examined by courts in accordance with contract law standards. *See, e.g., United States v. Sutton*, 794 F.2d 1415, 1423, (9th Cir. 1986); *State v. Claxton*, 128 Idaho 782, 785, 918 P.2d 1227, 1230 (Ct. App. 1996). As with other types of contracts, the interpretation of a plea agreement and its legal effect are questions of law to be decided by the Court if the terms are clear and unambiguous. *State v. Barnett*, 133

> Idaho 231, 234, 985 P.2d 111, 114 (1999); *Claxton*, 128 Idaho at 785, 918 P.2d at 1230. Contractual terms that are implied by the plea agreement, as well as those expressly provided, must be considered by the court. *United State v. Bunner*, 134 F.3d 1000, 1003 (10th Cir. 1998). *Doe*, 138 Idaho at 410-411.

Id.

This Court held that because the State was silent in citing a request for restitution in the plea agreement to the court, and the request was not implied, that it violated the plea agreement by making said request. *Id* at 411. At the time of decision, Doe had substantially completed most of the sentencing obligations imposed by the Court, and remand would accomplish nothing in a resentencing fashion. *Id.* Accordingly, the court required specific performance of the guilty plea agreement and it prohibited the State from requesting restitution. *Id.*

Another case on point is *State v. Jones*, 139 Idaho 299, 77 P.3d 988 (Ct. App. 2003). In this case, *Jones* was charged with domestic battery and aggravated assault. *Id* at 300. In exchange for dismissal of the domestic battery, Jones would plead guilty to aggravated assault. *Id.* Also, the State agreed to recommend upon imposing sentence that the Court retain jurisdiction pursuant to Idaho Code § 19-2601(4). At the sentencing hearing, which is very much on point with case at bar, the prosecutor began its comments by making the following statement:

> Well, Your Honor, I have to say that I've been doing research or have involved in the area of domestic violence pretty much since my senior year of high school and this is probably one of the most disturbing case I've ever dealt with, read about, seen, been involved in, so it's really as-it's a very emotional case for me to talk about, and so I'll try to do my best to keep it together.... And certainly I think [the presentence investigator] when he talks about, makes the recommendation that supervised probation is not recommended because Mrs. Jones needs to be protected, not just Mrs. Jones but those four children need to be protected from this violent man. And I think of the comment that no rehabilitation can occur

> until he realizes the seriousness of his unlawful behavior and that goes back to the 1992 incident.
>
> He doesn't accept responsibility for any of this behavior and this is just-this is-I think it's disgusting the way he has behaved and continues to not accept responsibility. Definitely there appears to be an alcohol problem which exacerbates the violence concerns. I originally, when we had he prelim[inary hearing], had offered that I would recommend retained jurisdiction. I'm bound by that. Certainly the court will do what Your Honor feels is appropriate. I did not know all the information I do know now and I will just leave that with the court. Thank you.

Id at 300-301.

Defense counsel did not object at the time this presentation was made. The district court imposed a unified sentence of five years with three and one-half indeterminate and did not retain jurisdiction. *Id* at 301.

First, the Appeals Court addressed counsel's lack of objection at the sentencing hearing. The Court held, "Ordinarily, this Court will not address an issue that was initially presented to the trial court." *Id* at 301 (*citing, Small v. State*, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998); *Remington v. State*, 127 Idaho 443, 448, 901 P.2d 1344, 1349 (Ct. App. 1995). "Nevertheless, because a breach of a plea agreement is fundamental error, a claim of such a breach may be considered for the first time on appeal if the record provided is sufficient for that purpose." *Id* (*citing, State v. Fuhrimarn*, 137 Idaho 741, 744, 52 P.3d 886, 889 (Ct.App.2002); *State v. Brooke*, 134 Idaho 807, 809 10 P.3d 756, 758 (Ct.App.2000).

The Court held that although a prosecutor is not required to make a sentencing recommendation with enthusiasm, "their overall conduct must be reasonably consistent with making such a recommendation, rather than the reverse." *Id* at 302 (*citing United States v.*

Canada, 960 F.2d 263, 270 (1st Cir.1992)). Ultimately, the Jones Court held that the prosecutor's comments were "fundamentally at odds" with the sentencing recommendation and remanded the case recommendation for resentencing. *Id* at 303.

The Court further addressed this issue in *State v. Daubs*, 140 Idaho 299, 92 P.3d 49 (Ct.App.2004). This case dealt with a plea bargain by which Daubs pled guilty to a sexual battery and a recommendation that Daubs would receive no more than retained jurisdiction (from the State). After a change of prosecutors, the new prosecutor made considerable issue out of the fact that the presentence investigation recommended prison, rather than retained jurisdiction. *Id.* Furthermore, the prosecutor prefaced her remarks to the Court by stating, "They're [victims' parents] better able than I am to explain the horrific consequences that this crime has had no them, their daughters, and their entire family." *Id.* The Appeals Court, also referenced comments that the prosecutor stated in her sentencing argument

> Your honor, I have spoken with [the prosecutor assigned to the case], and the State has agreed to recommend no more than a Rider in this case.
>
> The PSI investigator, however, clearly is recommending prison based on the nature of Mr. Daub's crimes, his prior record, and his substance abuse problems.
>
> Rather than having me restate the information presented to the Court in the PSI and in the letters from the victims, I would ask that this Court hear from [the victim's parents], who are here. They're better able than I am to explain the horrific consequences that this crime has had no them, their daughters, and their entire family.

Id at 301.

The Court, looking at the entirety of the argument, found that the recommendations were, "...clearly fundamentally at odds with the terms of the plea agreement." *Id* at 301. The Court

found that the State failed to fulfill its end of the bargain, and vacated the sentencing imposed remand for resentencing before a different judge. *Id.*

Similarly, in *State v. Wills*, 140 Idaho 773, 102 P.3d 380 (Ct.App.2004), the Court addressed this issue. Wills entered into a plea agreement and the State agreed to limit the sentencing recommendation to a unified term of fifteen years. The prosecutor initiated his comments by stating,

> [P]redators don't pick on the strong ones.... when they have an insatiable hunger, they are going to go after the ones that can't run as fast. So, what [Wills] has chosen to do is to satisfy his ... obsession by picking on a child who is barely of tender years and now is going to be force to bear this burden ... for the rest of her life.... What he did to those two little ones is just completely horrendous and almost unthinkable. And I think, at a very minimum, he should get three years fixed followed by twelve indeterminate for fifteen. I think the state is showing great restraint by only recommending that sentence.

Id at 774.

The State also emphasized that Wills was a pedophile, of high risk to reoffend and that probation was likely to impossible after his term of incarceration. *Id.* Correspondingly, the district court sentenced Wills to concurrent unified terms of life imprisonment with minimum periods of confinement of ten years. *Id.*

The Court held, "[T]he prosecutor articulated the sentences the State agreed to recommend, while presenting vigorous argument that was inconsistent with that recommendation." *Id* at 775-776. The Court concluded that prosecutor had breached the plea agreement between the parties, vacated the judgment of conviction, sentences, and remanded the case for resentencing to a different judge.

Certainly, there are additional cases that address this same issue.

Here, there is no question as to the terms of the plea agreement. A non-binding Rule 11 plea agreement, in writing, was presented to the Court at the change of plea hearing. The plea agreement clearly enunciated that the State, in exchange for the guilty plea, would recommend no more than retained jurisdiction. Ironically, the presentence investigation also recommended that Mr. Stocks participate in the retained jurisdiction program, and the psychosexual evaluation indicated that incarceration was not necessary for rehabilitation purposes. The plea agreement specifically allowed Mr. Stocks to argue whatever plea he felt necessary, and counsel argued for probation, but in the alternative, retained jurisdiction.

The State went on to present a case that was consistent with a prison recommendation. First, the prosecutor went on, at length, attacking the credibility of the various letter writers that presented information in mitigation for Mr. Stocks. After going through a multitude of those letters, the prosecutor attacked the representations made in the letters by indicating that Mr. Stocks lacked integrity, and that he had a "dark side". He referred to a "dark underbelly", a person that puts on "façade" talks about the deep sexual psychological issues, porn problems, and that Mr. Stocks has a dual personality.

Then, the prosecutor read from the presentence investigation, with excruciating detail, the nature of the offense. The State was aware of the allegations in this offense before making the plea agreement. This emphasis was completely unnecessary for a retained jurisdiction recommendation. Furthermore, the State emphasized the difference in age on at least two different occasions. Once again, the State was aware of the age difference between the Mr. Stocks and the victim prior to making the plea bargain. The State then again described other

factual instances with excruciating detail, pulling the proverbial heartstrings of the court, that were not directly related to a guilty plea.

The State then discussed various statements Mr. Stocks made to the psychosexual evaluator. The State emphasized that Mr. Stocks felt like he was being unjustly treated. Once again, the State had possession and had reviewed the psychosexual evaluation prior to offering the plea agreement. The State argued *ad nauseum* about how Mr. Stocks had violated the trust of the victim, and his use of pornography. Then, the State also emphasized that there was another victim which was uncharged. Once again, since the State had the psychosexual evaluation prior to making the plea agreement, the State was aware of the other uncharged victim.

The State made light of the fact that Mr. Stocks had performed well while wearing an ankle monitor for nearly five months. The State went out of its way to argue that Mr. Stocks would not be capable of being successful or supervised with aggressive sex offense treatment. Additionally, the State argued that the type of supervision that was necessary for Mr. Stocks was available in Franklin County. Ironically, the State was supposed to be recommending retained jurisdiction in this case, with the understanding, that if Mr. Stocks was successful in the retained jurisdiction program, **that he would be eligible for probation** upon his return. The State was not arguing for an underlying prison sentence. The State was not arguing for retained jurisdiction. The State had enticed Mr. Stocks with a plea agreement stating it would recommend retained jurisdiction, and then, at sentencing, pulled out the proverbial rug. The inescapable conclusion from this line of argument is that the State was actually recommending prison.

It is likely that the State is going to argue that prosecutor was simply arguing for underlying sentence. This is ridiculous. There was little argument or statement about underlying sentence, or the need to deter after Mr. Stocks returned from the rider. There is absolutely no question that the prosecutor was giving mere "lip service" to the retained jurisdiction recommendations.

Mr. Stocks did not object at the time these statements were being made. However, as this court has repeatedly held, "a breach of plea agreement fundamental error and the claim of breach may be consider for the first time on appeal of the record provided it is sufficient for that purpose." *Fuhrimarn*, 137 Idaho at 744; *Brooke*, 134 Idaho at 809. Here, the record is clear as to the terms of the plea agreement. The record is also extremely clear as to the arguments made at sentencing.

IV. CONCLUSION

In conclusion, the result is inescapable. The State offered Mr. Stocks a plea agreement to entice Mr. Stocks to plead guilty. Mr. Stocks relied on the State to live up to its end of the contractual bargain. The State either never intended to respect that agreement, or got "cold feet" at the sentencing as to its deal. Regardless, Mr. Stocks asks for specific performance of the plea agreement, i.e., that he be allowed to participate in the retained jurisdiction program. However, in the alternative, he seeks remand to district court, with sentencing being conducted by a different judge, and that terms of the plea bargain be honored. The breach of the plea agreement in Mr. Stocks' case is much more egregious then of those of Doe, Jones, Daubs, and Wills. The plea agreement was breached by the State. The statements made were equal to, if not more,

inflammatory than other case in which the sentencing was overturned. The State should not be allowed to benefit from this at Mr. Stocks' expense. This sentence must be reversed, and a lesson must be sent to the State – abide by the plea agreement or do not make one at all.

DATED this 15th day of November, 2011.

MAY, RAMMELL & THOMPSON, CHTD.
Attorneys for Appellant

AARON N. THOMPSON

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing *Appellate Brief* was served on the following named persons at the addresses shown an in the matter indicated.

Lawrence Wasden	[✓] U.S. Mail
Office of the Attorney General	[ ] Facsimile
P.O. Box 83720	[ ] Hand Delivery
Boise, ID 83720-0010	

DATED this 15th day of November, 2011.

MAY, RAMMELL & THOMPSON, CHTD.